

APPEAL NO. 040878  
FILED JUNE 1, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 18, 2004. With respect to the issues before him, the hearing officer determined that the respondent's (claimant) impairment rating (IR) is 16% as certified by the designated doctor selected by the Texas Workers' Compensation Commission (Commission) and that the claimant is entitled to supplemental income benefits (SIBs) for the first and second quarters because the appellant (carrier) waived its right to contest the claimant's entitlement to SIBs by failing to timely request a benefit review conference (BRC). The hearing officer determined, in the alternative, that the claimant is entitled to SIBs pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) because she had no ability to work in the qualifying periods for the first and second quarters of SIBs. In its appeal, the carrier argues that the hearing officer erred in giving presumptive weight to the designated doctor's 16% IR and that he erred in determining that she was entitled to SIBs because had the hearing officer correctly resolved the IR issue, the claimant would not satisfy the threshold requirement of having an IR of 15% or more. In her response to the carrier's appeal, the claimant urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_, and although the parties did not stipulate as to the date of maximum medical improvement (MMI), there appears to be no dispute that the claimant reached MMI by operation of Section 401.011(30)(B) on October 11, 2002. The hearing officer did not err in determining that the claimant's IR is 16% as certified by the designated doctor in his last report of January 5, 2004. In that report, Dr. C, the designated doctor, stated that the 16% IR was assigned pursuant to Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides). The Commission sent five letters of clarification to the designated doctor in this case, and in response to those letters, the designated doctor entered four different IRs, a 20%, a 10%, a 12%, and a 16%. The carrier argues that "the fact that [the designated doctor] was unable to arrive at any consistent [IR] clearly demonstrates his inability and/or refusal to properly utilize the AMA Guides in his [IR] of the Claimant." We disagree. In response to letters of clarification, the designated doctor did change his IR several times in this case; however, that fact, in and of itself, does not demonstrate that he did not properly follow the AMA Guides in doing so. In response to the last letter of clarification, the designated doctor stated that the claimant's IR was 16% and that the entire rating was assigned for a specific disorder of the lumbar spine in accordance with Table 49 of the AMA Guides. The designated doctor had previously assigned a 12% IR under Table 49

and he did not provide an explanation for the change. Nevertheless, we are not going to assume that he failed to follow the AMA Guides in this instance. The carrier was the party disputing the designated doctor's decision to assign a 16% IR under Table 49 and it needed to produce medical evidence indicating that the designated doctor's Table 49 was not in accordance with the AMA Guides. The carrier did not produce any such evidence. Rather, it made the assertion that the mere fact that the designated doctor changed his mind indicates that he did not follow the AMA Guides. The hearing officer rejected that argument and we do not believe that he erred in so doing. The determination that the claimant's IR is 16% is, therefore, affirmed.

The resolution of the waiver issue controls the issue of the claimant's entitlement to SIBs. The carrier does not dispute that it did not timely file its Request for [BRC] (TWCC-45). Instead, the carrier argues that since the issue of whether the claimant had an IR of 15% or more had not been resolved, it was not required to timely file its request for a BRC. That is, the carrier argues that the hearing officer "failed to recognize that a claimant's entitlement to [SIBs] is contingent upon her ability to meet the requirements set forth [in Section 408.142]." We find no merit in this argument. Section 408.147(b) and Rule 130.108(c) and (d) clearly provide for waiver of the right to contest entitlement to SIBs if the carrier does not file its request for a BRC within the 10-day period provided for doing so. The carrier did not file its TWCC-45 until the 11th day after it received notice of the Commission's determination of entitlement to first quarter SIBs and the claimant's application for second quarter SIBs. Thus, the hearing officer did not err in determining that the claimant is entitled to SIBs for the first and second quarters based upon the carrier's waiver of its right to contest SIBs entitlement. If, as the carrier argues, the claimant had to otherwise prove entitlement to SIBs in order to receive those benefits, the waiver provision would be meaningless. Indeed, it would seem that the carrier's decision to contest SIBs entitlement in this case could have been easily made because there was an ongoing dispute as to whether the claimant had a 15% or greater IR, at the time the carrier received the notice that triggered the 10-day period to request a BRC.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
1021 MAIN STREET  
HOUSTON, TEXAS 77002.**

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Daniel R. Barry  
Appeals Judge

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Robert W. Potts  
Appeals Judge